Supreme Court, U.S.
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No. 90-1584

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

SANDRA R. KEMP,

Petitioner,

vs.

STATE BOARD OF AGRICULTURE, AND COLORADO STATE UNIVERSITY; ROSELYN KELLER, IN HER CAPACITY AS A CONCILIATION OFFICER AT COLORADO STATE UNIVERSITY; DANA HIATT, IN HER CAPACITY AS DIRECTOR OF OFFICE OF EQUAL OPPORTUNITY AT COLORADO STATE UNIVERSITY; AND PHILLIP AUSTIN, IN HIS CAPACITY AS PRESIDENT OF COLORADO STATE UNIVERSITY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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QUESTION PRESENTED

1. Whether the Colorado Supreme Court's analysis of the Petitioner's claim of retaliation for the exercise of her right of freedom of speech was in accordance with the applicable decisions of this Court.

2. Whether the Colorado Supreme Court's application of the balancing test to Petitioner's claim under the petition clause of the First Amendment is consistent with applicable decisions of this Court, and the federal courts of appeals.

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I. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

The critical facts of this case are undisputed. Petitioner, Sandra Kemp, was employed with Colorado State University ("CSU" or the "University") as an extension agent from August 16, 1982 to August 30, 1985. This case arose out of a discrimination complaint filed by Petitioner with the Equal Opportunity Office of CSU ("University EEO") pursuant to the University Grievance Procedure for the Resolution of Complaints of Discrimination ("Grievance Procedure"). Petitioner alleged in her discrimination complaint, *inter alia* that she was a victim of on-the-job racial discrimination by two white males.

Under the Grievance Procedure, an employee who files a complaint of discrimination may choose to proceed either formally or informally, and the hearing may be either open or closed. If the complainant chooses to proceed informally, he or she may simultaneously pursue remedies in other outside agencies and courts. If the complainant chooses to proceed formally, he or she must allow the internal University procedure to proceed to conclusion before seeking outside assistance.

Petitioner selected a formal, closed hearing. Petitioner read a copy of the Grievance Procedure and understood the distinction between informal and formal complaints prior to making that selection. Petitioner did not seek any assistance from the University EEO office prior to choosing a formal, closed hearing. Petitioner admitted that she considered the Grievance Procedure to be binding upon both parties.

Prior to Petitioner's closed hearing, Petitioner violated the closed nature of the hearing by sending a "routing slip" to the office of Senator William L. Armstrong, asking to "have the Senator's office to monitor my complaint [sic]." On or about January 25, 1985, the formal, closed hearing was held. After the hearing was completed, but prior to the hearing

panel rendering its decision, Petitioner's husband contacted the office of Senator William L. Armstrong to complain of what he perceived to be "too many irregularities practiced by the EEO office to prejudice the case in the Defendants' favor."[1] The letter requested that the office of Senator Armstrong assist Petitioner in obtaining a "proper" review of Petitioner's complaints by the Department of Labor and assist Petitioner "in maintaining her employment at CSU." Petitioner admitted that, although the letter was signed by her husband, she considered it to be her letter as well.

Joann Gelvin of Senator Armstrong's office contacted CSU concerning Mr. Kemp's complaints and asked for information regarding Petitioners discrimination complaint. It was through Joann Gelvin that Respondent learned of the earlier contact with Senator Armstrong's office via the routing slip. On or about February 13, 1985, Petitioner was informed by Respondent Roselyn J. Keller, Conciliation Officer, that Petitioner's contacts with Senator Armstrong's office breached the formal, closed nature of the hearing to which the

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[1] The "irregularities" referred to in the letter to Senator Armstrong are as follows: (1) that Mr. Lesser was acting in the capacity as both a representative and a witness; (2) that her supervisor, Mr. Lesser, was also the Defendants' supervisor; (3) that she had been told she could not have an attorney present during the hearing; (4) that each of the respondents had their own representatives, so since there were two respondents, there were two representatives for the respondents; (5) that Ms. Keller issued an informal decision by suggesting to Plaintiff's representative that she might consider resignation before Plaintiff's case was voided. (Plaintiffs Deposition at 88, 93, 95, and 99) Plaintiff's husband, Darryl Kemp, alleges that the following additional irregularities occurred: (6) the Director of Extension, Chadwick, "absented" himself from the case claiming neutrality; (7) Mr. Kemp was required to testify and then leave the proceedings; (8) Mr. Kemp was told that he could not be a representative because he was not from the "CSU community"; (9) in the event that Plaintiff would receive a favorable verdict, that the perpetrators would not be punished, and she would not receive what she had requested in her Complaint; (10) Plaintiff was told the hearing would last three days, and in fact, it only lasted one and one-half days. (Darryl Kemp Deposition at 52-54)

parties agreed, and therefore, the Grievance Procedure was "voided." Petitioner was informed by Respondent Keller that although the internal Grievance Procedure was terminated, she was free to pursue her discrimination complaint in other agencies and in the courts.

B. PROCEEDINGS BELOW

Petitioner brought the instant action against Colorado State University, Roselyn Keller in her official capacity as CSU's Conciliation Officer, Dana Hiatt in her official capacity as CSU's Director of Office of Equal Opportunity and Philip Austin in his official capacity as CSU's President. Petitioner filed her complaint in the District Court for the County of Larimer, State of Colorado on or about October 6, 1986, alleging claims of violation of her rights of free speech and to petition the government for redress of grievances under the United States Constitution and the Colorado Constitution. After discovery, Respondents moved for summary judgment on each of Petitioner's claims. The District Court for the County of Larimer granted summary judgment in favor of Respondents ruling that Petitioner's speech was not on a matter of public concern and that in any event, CSU's interest in maintaining the integrity of its grievance procedure outweighed the interest of Petitioner. The District Court also ruled that Petitioner's conduct was not protected by the petition clause.

The Petitioner appealed to the Colorado Court of Appeals which affirmed the judgment of the District Court. While the appeal was pending before the Colorado Court of Appeals, this Court announced its decision in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) holding that states, their agencies and employees while acting in their official capacities were not persons subject to suit under 42 U.S.C. §1983. The Colorado Court of Appeals ordered the parties to submit supplemental briefs on the question of whether Colorado State University is an agency of the State of

Colorado. The Court of Appeals ruled on the merits of Petitioner's appeal and stated that "[s]ince we have determined that plaintiff's claims were properly dismissed for lack of substantive merit, we need not address the impact of *Will* upon this case."

Petitioner then petitioned the Colorado Supreme Court for writ of certiorari. The writ was granted and after briefing and oral argument, the Colorado Supreme Court affirmed the Court of Appeals. Although the issue was raised before the Colorado Supreme Court, the Supreme Court likewise did not address whether CSU is an agency of the State of Colorado and thus not subject to suit under 42 U.S.C. §1983.

II. REASONS FOR NOT GRANTING THE PETITION

A. The Respondents are an agency of the State of Colorado and State employees sued in their official capacities only and are thus not persons subject to suit under 42 U.S.C. §1983

Petitioner does not dispute that her claims are against the University itself and University employees sued only in their official capacities. As stated above, neither the Colorado Court of Appeals nor the Colorado Supreme Court have ruled upon whether Colorado State University is an agency of the state of Colorado and thus not subject to suit under this Court's decision of *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

Absent a determination that the Respondents are persons subject to suit under 42 U.S.C. §1983, the issues raised in Petitioner's Petition for Writ of Certiorari are only *potential* federal claims rather than actual federal claims. Thus, this Court should decline to review the decision of the Colorado Supreme Court on certiorari.

B. The Petition for Certiorari should be denied since the Colorado Supreme Court's analysis of the Petitioner's claim of retaliation for the exercise of her right of freedom of speech was in accordance with the applicable decisions of this Court.

Assuming that federal claims exist, the Colorado Supreme Court engaged in the correct analysis in evaluating Petitioner's claims of violation of the rights of free speech and to petition. The analysis to be utilized to evaluate such claims is well settled. Beginning with the case of *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), this Court has applied a three-step process by which a public employee's claim of retaliation for exercising a first amendment right is to be evaluated. Initially, the plaintiff must show that her speech touched upon a matter of public concern. If the court concludes that the speech is a matter of public concern, then the court must perform a balancing test to determine if the interest of the employee, as a citizen, in commenting upon the subject at issue outweighs the interest of the government, as the employer in promoting an efficient work environment. (*Connick v. Myers*, 461 U.S. 138, 148 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968)) If the balance weighs in favor of the government, the analysis then ends. If the balance weighs in favor of the plaintiff, then the plaintiff must demonstrate that the speech was a substantial or a motivating factor behind the adverse employment decision. Only after those two factors are established by the plaintiff does the burden shift to the defendant. In order to defeat the plaintiff's claim, a defendant must show by a preponderance of the evidence that, absent the protected activity, plaintiff would have suffered the same adverse decision. (*Mt. Healthy, supra* at 287)

The Colorado Supreme Court engaged in that precise analysis in the instant case. The Supreme Court examined the speech in question and determined that it touched upon a matter of public concern. The Colorado Supreme Court then weighed the interests of the Petitioner against the interests of

CSU in maintaining the integrity of its grievance process. The Colorado Supreme Court determined that the primary interest that Petitioner sought to promote was her personal dispute against the University and not to alert the public to a wider problem at the University. The court weighed the Petitioner's self-serving interest against the University's interest in having a grievance policy that was followed by all the parties. After the weighing process, the Colorado Supreme Court determined that the balance weighed in favor of the University. Although Respondents disagree with the conclusion of the Colorado Supreme Court that Petitioner's speech touched upon a matter of public concern, clearly, the Colorado Supreme Court was correct in its ultimate conclusion that Petitioner's interest was outweighed by the University's interest.

The Colorado Supreme Court engaged in an analysis of Petitioner's claims consistent with the decisions of this Court, thus this Court should deny the Petition for Writ of Certiorari.

C. The Colorado Supreme Court's application of the balancing test to Petitioner's claim under the petition clause of the First Amendment is consistent with applicable decisions of this Court, and the federal courts of appeals.

This Court has stated that "the right to petition is cut from the same cloth as the other guarantees of the [First] Amendment, and is an assurance of a particular freedom of expression." (*McDonald v. Smith* 472 U.S. 479 (1985)) In evaluating petition claims, this Court has specifically rejected the notion that the Petition Clause protects speech regardless of the content of the petition. (*See McDonald, supra*; *White v. Nicolls* 3 How. 266, 11 LEd. 591 (1845)) This Court in *McDonald* stated:

> To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special first

> amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish and assemble. *See Mine Workers v. Illinois Bar Association* 389 U.S. 217, 222 (1967). These first amendment rights are inseparable, *Thomas v. Collins* 323 U.S. 516, 530 (1945), and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other first amendment expressions.

(*McDonald, supra* at 484-85)

The United States Courts of Appeals have refused to grant heightened protection for speech clothed as a petition for redress. For example, the Seventh Circuit stated in *Belk v. Town of Minocqua* 858 F.2d 1258 (7th Cir. 1988):

> Notwithstanding the central importance *Connick* attaches to the content of a public employee's speech, Belk asks us to accord absolute first amendment protection, without regard to content, to any grievance a public employee files or threatens to file. Not only is there no legal or historical precedent for such a stratification of first amendment freedoms, as *McDonald* suggests, but such special treatment of the right to petition would unjustly favor those who through foresight or mere fortuity present their speech as a grievance rather than in some other form. Accordingly, we decline to hold as a matter of law that the fact that the Town Board may have terminated Belk in retaliation for threatening to file a grievance constitutes a *per se* violation of the first amendment.

(*Belk, supra* at 1262; *See also Thorn v. Bailey*, 846 F.2d 241, 244 (4th Cir. 1988) ("Since it is plainly contrary to *McDonald* we reject [plaintiffs] argument that the Petition Clause enjoys a 'preferred place' among first amendment freedoms.");

Gray v. Lacke 885 F.2d 399, 413 (7th Cir. 1989) ("[I]n deciding whether a public employer has wrongfully deprived an employee of his right to petition the government, our inquiry must begin with whether the petition touched upon a matter of public concern by looking at the content, form, and context of the petition."); *Phares v. Gustafsson* 856 F.2d 1003, 1009 (7th Cir. 1988) ("Thus, we will analyze an alleged violation of the petition clause in the same manner as any other alleged violation of the right to engage in free speech."))

Thus, consistent with this Court and the various federal courts of appeals, the Colorado Supreme Court concluded that although her petition tangentially related to a matter of public concern, in the balance, the Petitioner's interest in "petitioning" Senator Armstrong in regard to her private personnel dispute was outweighed by the University's interest in maintaining the integrity of its grievance procedure. Precluding a court from engaging in such a balancing of interests would result in elevating the right to petition above all other rights protected by the First Amendment. Consequently, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 1991, three true and correct copies of the above and foregoing **BRIEF OF RESONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT** was deposited in the United States Mail, postage prepaid, addressed to:

A. Bruce Jones, Esq.
HOLLAND & HART
Post Office Box 8749
Denver, Colorado 80201

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

The foregoing instrument was acknowledged before me this ___ day of May, 1991 by _____. Witness my hand and official seal.

My commission expires: _____

[S E A L]

_____
Notary Public